85-1249

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID L. McCOLLUM,

—against— *Petitioner,*

ANTHONY R. REID,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

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January 22, 1986

QUESTIONS PRESENTED

1. Whether the judicial modification of an unambiguous statutory definition which results in the exclusion from the class of persons who are "issue" of those persons who were adopted out of their natural families is a violation of the Equal Protection Clause of the Fourteenth Amendment?

2. Whether a person who utilized the term "issue" in a will is deprived of her constitutional right to Equal Protection of Law where the unambiguous statutory definition of the term "issue" is altered twelve years following the testator's death thereby altering the beneficiaries of a trust created under her last will and testament?

3. Whether the judicial modification of an unambiguous statutory definition which results in the divestiture of an individual's property rights, subsequent to vesting of the same, violates the individual's constitutional right to due process of law?

LIST OF PARTIES TO THE PROCEEDING

The following are the parties to this proceeding:

David L. McCollum, Petitioner

Anthony R. Reid, Respondent

Andrew Ian Cook and Morgan Guaranty Trust Company of New York as Trustees of the Trust Created Under Article Tenth of the Will of Jessie C. Best, Deceased (the trustees did not submit briefs or orally argue the case in the Court below or in the Appellate Division).

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

DAVID L. MC COLLUM,

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vs.

ANTHONY R. REID,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OPINIONS BELOW

The opinion of the New York Court of Appeals on October 24, 1985 is reported at 66 N.Y.2d 151 together with a dissenting opinion of Judge Jasen in which Judge Meyer concurred.

An earlier opinion of the Supreme Court Appellate Division, which affirmed the earlier opinion of the Surrogate's Court and which was subsequently reversed by the opinion of the Court of Appeals, was reported at 102 A.D.2d 660 and had

affirmed the order of the Surrogate's Court and awarded costs against the respondent personally.

The earlier opinion of the Surrogate's Court was reported at 116 Misc.2d 365 (1982).

All opinions are reproduced in the appendix to this petition.

JURISDICTIONAL GROUNDS IN THIS COURT

The opinion sought to be reviewed was entered by a State Court and draws into question the validity of state statutes on the grounds that they are repugnant to the constitution and deprive the petitioner of his rights under the constitution. The petitioner was denied benefit of the legislative definition of the word "issue" as a result of which petitioner was deprived of his rights as beneficiary

of a trust created under the last will and testament of his natural grandmother. 28 U.S.C. Sec. 1257(3) is the statutory provision which confers jurisdiction on this Court to review the opinion in question by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The New York Statute which defines the word "issue" is N.Y. Est. Powers & Trust Law Sec. 1-2.10 which provides:

> "(a) Unless a contrary intention is indicated:

(1) Issue are the descendants in any degree from a common ancestor.
(2) The terms 'issue', and 'descendants' in subparagraph (1), include adopted children."

The New York State Constitution Article 3, Section 1 provides:

"The legislative power of the State shall nest in the Senate and Assembly."

STATEMENT OF THE CASE

In November 1973 Jessie Best died, and her will was subsequently admitted to probate in the Surrogate's Court, Westchester County. Her residuary estate was placed in trust for the lifetime benefit of her sole surviving daughter, Ardith Reid, and, thereafter, for the benefit of Ardith Reid's surviving "issue".

During the administration of Jessie Best's estate her daughter reminded the trustees of the existence of the petitioner and the fact that he was her child

who had been adopted by others.

There is no dispute that Jessie Best knew of the existence of the petitioner, David McCollum, and indeed the parties stipulated that David McCollum is the non-marital son of Ardith Reid, of the bloodline of Jessie Best and Ardith Reid, and that Jessie Best was aware of David McCollum's birth, at the time of his birth which was prior to the execution of her last will and testament. (See appendix at page A64).

During the initial accounting proceedings, the attorneys for the executors and trustees, together with Ardith Reid, sought to locate petitioner, David McCollum and in furtherance thereof wrote the adoption agency advising them that following Ardith Reid's lifetime the petitioner will be an income beneficiary of a trust of approximately $500,000.00.

(See appendix at page A67). Based upon the foregoing, David McCollum agreed to reveal his identity, was contacted by the attorneys for the Executors and Trustees (See Appendix at page A71), appeared in an accounting proceeding in which a guardian ad litem appointed for Ardith Reid's other child, Anthony Reid, concurred with the trustees' attorneys that under existing New York law David McCollum was a beneficiary under the trust created by his natural grandmother's will.

Subsequent to the death of his natural mother, Ardith Reid, a construction proceeding was commenced and the petitioner's half brother (Anthony Reid) argued that petitioner was not entitled to take under his grandmother's will.

The Surrogate's Court held that petitioner David McCollum was a bene-

ficiary under the trust because it is undisputed that David McCollum was an issue of his natural grandmother and fit precisely within the statutory definition.

The Surrogate below, concluded that:

> "There are no qualifications expressed in the Will with respect to the 'issue' surviving decedent's daughter. As used in the Will, it describes a class of persons who may be the secondary income beneficiaries of the trust. Under EPTL 1-2.10, issue is defined as the descendants in any degree from a common ancestor, unless a contrary intention is indicated.
>
> * * *
>
> There is no language in the will itself suggesting an intention different from that defined by statute should be given to the word 'issue'." Matter of Best, 116 Misc.2d 365, 373-374, 455 N.Y.S.2d 487, 493 (1982).

The Surrogate further correctly noted that New York law expressly elected not to eliminate an adopted child's right to

inherit from its natural family under the last will and testament of any natural ancestor. N.Y. Dom. Rel. Law Sec. 117.

The Appellate Division of the Supreme Court affirmed the decision of Surrogate Brewster noting that since the petitioner David McCollum is an issue of his natural mother as the word is used in the will of Jessie Best. The Appellate Division found that there was no intention expressed within the will to rebut the statutory definition and affirmed the decree of Surrogate Brewster and directed that costs be payable personally by the respondent.

Subsequent to the decision of the Appellate Division, the New York Legislature considered an amendment to existing law which would have altered the result for similar cases arising prospectively.

> "Under present law, an adopted person cannot inherit in intestacy from or through natural kindred, except a natural parent who is married to an adopting step-parent, even though the adoption was by a step-parent or other person related by blood or marriage and the adopted child remained within the natural family unit (DRL §117). Conversely, under such law, an adopted person may inherit or benefit as a member of a class (i.e., 'children', 'issue', 'nieces', 'nephews') named as beneficiaries under a will..." 2 McKinney's 1984 Session Laws of New York, Memorandum of the Law Revision Commission, pp. 3050 (1984).

The proposal of the Law Revision Commission did not become the law of the State of New York and the legislation was subsequently recalled from the Governor by its sponsor. Moreover, had the Commission's proposal become law, it would nonetheless not have become effective until September, 1985, well after the vesting of David McCollum's rights as a beneficiary of the trust created under his natural grandmother's will.

Notwithstanding the foregoing the New York Court of Appeals changed the decisions of the Surrogate's Court and Appellate Division and altered the statutory definition of the word "issue" which had previously been enacted by the legislature. The legislative definition of "issue" included all descendants from a common ancestor unless a contrary intention was actually indicated. Yet the Court of Appeals held that a child adopted out of his family will now only be deemed to be an issue if express reference is made to such child. The Court of Appeals incorrectly refused to follow the statutory definition reasoning that any change by the legislature would not be given retrospective operation.

The dissenting opinion of Judge Jasen (concurred in by Judge Meyer) properly noted that the majority had altered

existing law so as to make it inapplicable to the petitioner:

> "I would hold that statutory law and the unqualified use of the term 'issue' in the testatrix's will compels the conclusion that her adopted-out grandson is entitled to an equal share of the trust fund the testatrix created under her will.
>
> * * *
>
> The statutory definition is unambiguous and unqualifed, and nothin in testatrix's will renders it less so. 'Issue' includes all descendants, and there is simply no language in the testatrix's will indicating a 'contrary intention'." (footnote and citation omitted) (emphasis supplied) (See Appendix at page A14).

REASONS FOR GRANTING THE WRIT

This case represents a construction by a State Court which directly contradicts a legislative definition, usurps legislative authority, and deprives the petitioner and his deceased grandmother of their rights to equal protection of the laws as guaranteed by the Fourteenth

Amendment to the United States Constitution. Furthermore, in construing a state statute the majority of the Court of Appeals usurped the legislative function, exceeded their traditional authority, altered a plain and unambiguous statutory definition and in so doing altered the terms of a will and the property rights to be derived thereunder. A will and the law in existence at the time of the execution or probate of the will was thus altered after the fact.

The dissenters below, the judges of the Appellate Division, the Surrogate, and the attorneys for the trustees and the executors all agreed as to the existence and interpretation of these unambiguous state laws under which petitioner's rights became vested. Thereafter, the legislature considered but declined to amend the applicable statutes

having full knowledge of the definitions and the plain and forthright interpretation thereof. The dissenting opinion properly recognizes that the court is "compelled" to find for the petitioner because of the existing state law and no justification exists for denying the petitioner and his natural grandmother the full rights and benefits of the existence of such laws and the property rights which are derived therefrom.

1. The Fourteenth Amendment Prohibits a Construction Which Excludes An Issue From Taking Under His Natural Ancestor's Will Where A Statute Defines Him To Be Within The Class Of Persons Who Are "Issue" And Where The Legislature And Executive Have Considered But Refused To Amend Such Statute.

Although the highest court of a state will initially be afforded the right to interpret a state's statute, it is well settled that the Supreme Court will intervene and review a construction of a

state's statute which results in a deprivation of an individual's constitutional rights. Chandler v. Florida, 449 U.S. 560 (1981).

Petitioner, as well as his natural grandmother, were both entitled to equal protection of the laws of the State of New York in connection with laws which would govern and control his grandmother's ability to leave property to proposed beneficiaries, as well as the beneficiaries rights to such property. At the time that Jessie Best executed her will she knew of the existence of the petitioner, David McCollum, knew that he was her issue, knew that he was an issue of her daughter, and was charged with knowing that the law of the State of New York defined issue so as to include him unless she otherwise provided. (EPTL 1-2.10). In preparing and excuting her

will she was fully entitled to all benefits and protections of the statutes which also existed at the time of her death. Similarly, petitioner was entitled to take as a beneficiary under the trust created under his natural grandmother's will and no issue of fact exists as to a status since the parties had stipulated that petitioner is of the blood line of his grandmother and mother. (See appendix at page A64). The Court of Appeals, in redefining the word "issue" has treated the petitioner differently than other issue of his natural grandmother thereby depriving him of his rights to equal protection of the laws of the State of New York and the Federal Constitution. French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977), aff'd 443 U.S. 901 (1979).

Not only is there no rational basis for the creation of a special class in which petitioner falls but the opinion below represents a far more drastic measure since it altered and ignored a statutory definition. Although state courts have been afforded certain leeway in construing statutes, there is no justification to permit a state court the power to create a new classification where the legislature has defined the entire class and has elected not to create such a subclassification.

Had New York legislature not defined the word issue it may be possible for the courts of New York to constitutionally define the word issue; but where the legislature has already enacted a definition of the word issue and subsequently refused to amend the same, the state judiciary should not be empowered to

alter a legislative definition and any effort or attempt to do so must be very strictly construed by the Supreme Court. See, New York Constitution Article 3, Sec. 1; McKinney's Statutes Sec. 92.

Petitioner's rights to equal protection of New York laws and legislative definitions concern fundamental personal rights and family relations with his natural mother and grandmother. Even assuming, arguendo, that the Court of Appeals has a latitude in redefining a legislative definition so as to create a separate class in which to place petitioner the Supreme Court has recognized that:

> "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." (citations omitted) Weber v. Aetna Casualty & Surety Company, 406 U.S. 164, 173 (1972)

The construction of the word "issue" by the Court below, twelve years following the death of Jessie Best, constitutes a denial of her rights to equal protection of the laws as they existed and were applicable to her estate at the time of her death as well as the time of the execution of her last will and testament. It is undisputed that the decedent knew of David McCollum's existence and that he was in her bloodline. As the dissent below and the opinions of the Surrogate and Appellate Division recognize there is nothing contained in the last will and testament of Jessie Best to indicate any intention on her part to exclude David McCollum as an issue who would take under the trust created within her will. (See Appendix at page A19). She had every reason to rely upon the statutory definition of issue which had been enacted six

years prior to the execution of her will (EPTL 1-2.10) and remained unamended as of the date of her death. No justification can exist for depriving Jessie Best of her right to dispose of her property rights as she deemed fit under existing law or to place her within a special class of persons who cannot benefit by statutory definitions solely because her grandchild was adopted out of the family due to particular needs at that time. There is no basis to deprive Jessie Best of her intent which is clearly set forth within her will. Matter of Watson, 262 N.Y. 284, (1933). Citizens who executed their wills at the same time as Jessie Best (1973) now have the opportunity to change those wills in an effort to comply with the new definition of the word "issue" imposed by the court below so that their intention can be carried

out and any adopted out lineal descendants will be included. Jessie Best's death precludes her from complying with the opinion below which altered prior existing law and, therefore, she is denied the right to dispose of her property under existing laws in the way she deems fit and appropriate. Such treatment is in violation of the Equal Protection Clause of the Fourteenth Amendment. O'Brien v. Skinner, 414 U.S. 524, 529 (1974).

The result sought by the petitioner is consistent with results reached in other states in similar instances, See, e.g. In re: Wolf, 98 N.J. Super. 89 (1967), cert denied, 51 N.J. 273 (1968); Monroney v. Merchantile-Safe Deposit and Trust Company, 435 A.2d 788 (Court of Appeals Maryland, 1981)

2. The Petitioner Has Been Denied His Right To Property Without Due Process Of Law As Protected Under The Fourteenth Amendment.

By surviving his mother the petitioner, David McCollum, became vested with a property interest which entitled him to the income from one-half of the total corpus of the trust during his life with the remainder to go to his surviving children. Indeed, at the time of his natural grandmother's death, the only thing that could have prohibited petitioner from receiving his interest in the trust would have been his failure to survive his natural mother Ardith Reid.

> "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for a cause". (citations omitted) Logan v. Zimmerman Brush Company, 455 U.S. 422, 431 (1982).

Under existing New York law at the time of decedent's death and at the execution of her will the petitioner fit

expressly within the definition of those persons who were entitled to participate in the estate as beneficiaries. The majority below redefined the term "issue" as set forth in the (EPTL 1-2.10) so as to deprive petitioner of his property right.

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interest that a person has already acquired in specific benefits. These interests - property interests - may take many forms." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

In the instant case petitioner by New York State law was vested with certain benefits under a trust created by his grandmother's will. Any effort to reconstrue or alter a statute after vesting of the petitioner's property rights violates the procedural protection of property provided by the Fourteenth Amendment.

CONCLUSION

The petition for writ of certiorari to the Court of Appeals of the State of New York should be granted.

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Dated: January 20, 1986

APPENDIX

APPENDIX A
OPINION OF THE NEW YORK STATE OF APPEALS DATED OCTOBER 24, 1985

- x

In the Matter of the Estate of
Jessie C. Best, Deceased.

Anthony R. Reid, Appellant,

David L. McCollum, Respondent.

- x

TITONE, Judge.

The question presented is whether a child born out of wedlock, who is adopted out of his biological family at birth, is intitled to a share of a trust estate devised by his biological grandmother to her daughter's issue. The Surrogate's Court entered a decree in the child's favor, which has been unanimously affirmed by the Appellate Division, 102 A.D.2d 660, 477 N.Y. S.2d 431. We granted leave to appeal and now reverse.

Jessie C. Best died in 1973, leaving a will which provided for a residuary trust. Her daughter, Ardith Reid, was designated as the income

beneficiary. Upon Ardith's death, the trustees were directed to "divide [the] trust fund into as many shares or parts as there shall be * * * issue * * * and to continue to hold each of such shares or parts in trust during the life of one of said persons." The remainder is to be paid to the surviving descendants at the latest possible date consistent with the Rule against Perpetuities.

Initially, the executors of the Best will, who are also the trustees of the residuary trust, believed that Ardith has only a single son, appellant Anthony R. Reid, born in 1963. In 1976, however, they were informed that Ardith had given birth to a child out of wedlock in 1952, and that the child had been immediately placed with an agency for adoption. Ardith confirmed that the information was accurate.

Concluding that it was necessary to cite this unknown child in order to complete jurisdiction in a proposed accounting proceeding, the fiduciaries

obtained Ardith's authorization to ascertain the child's identity and whereabouts. Attorneys contacted the adoption agency, which, though finding the request "unusual," took the position that, given the apparently large value of the beneficial interest involved, the question of disclosure should be left to the discretion of the adoptive parents. A caseworker was dispatched and the adoptive parents subsequently revealed that the child's present identity was David Lawson McCollum, and that requisite proof of natural ancestry could be obtained in a sealed file at the Surrogate's Court, Nassau County.

After Ardith's death, the trustees commenced this construction proceeding, seeking to determine the proper secondary income beneficiary or beneficiaries, the accounting proceeding having left the question open. On cross motions for summary judgement, the Surrogate's Court, Westchester County, directed that McCollum be included as an issue of Ardith Reid and, as such, a

beneficiary under the trust. The Surrogate declined to apply the common-law presumption that the term issue referred only to descendants born in wedlock, in favor of a rule espoused by the Appellate Division, First Department, which presumes that issue includes descendants born both in and out of wedlock (Matter of Hoffman, 53 A.D.2d 55, 385 N.Y.S.2d 49). In addition, the Surrogate construed Domestic Relations Law § 117, which describes the consequences attached to an order of adoption, as cutting off only the right to intestate descent and not affecting the right to take a class gift under the will of a biological ancestor. The Surrogate recognized that this holding would create a myriad of practical difficulties and might lead to a breach of the privacy of adoption proceedings, but believed that the solution was legislative. The Appellate Division unanimously affirmed in a Per Curiam opinion, essentially adopting the Surrogate's reasoning. We now reverse and remit for the entry of a decree in conformity with this opinion (SCPA 2702).

Use of the term issue in a dispositive instrument has always been viewed as ambiguous, with its meaning depending on the intent of the decedent as derived from the content of the entire will (Palmer v. Horn, 84 N.Y. 516, 519; 5 American Law of Property § 21.49, 22.36 [1952 Casner ed]; 2 Simes and Smith, Future Interests § 738 [2d ed]). Shaped by the mores of the day, the common-law courts tended to give the term a restrictive interpretation (Bergin and Haskel, Preface to Estates in Land and Future Interest, at 232 [2d ed]), and viewed a child born out of wedlock as the "child of nobody" (5 American Law of Property § 22.33, at 325 [1952 Casner ed]). Absent a contrary indication in the will, such a child was deemed to be presumptively excluded from taking a class gift to issue (see, e.g., Hiser v. Davis, 234 N.Y. 300, 305, 137 N.E. 596; Matter of Underhill, 176 Misc. 737, 739, 28 N.Y.S.2d 984 [Foley, S.]; 9 Rohan, N.Y.Civ.Prac., EPTL 1-2.10[3]; Restatement of Property § 286[1]; § 292).

EPTL 1-2.10, added in 1966, defines "issue" as descendants in any degree from a common ancestor, unless a contrary intention is indicated, and specifically includes children adopted into the family, thus resolving a conflict which had existed in decisional law (see, 2 Simes and Smith, Future Interests § 738, n 40 [2d ed]) in favor of inclusion (9 Rohan, N.Y.Civ. Prac., EPTL 1-2.10[2]; Note, Adopted Children as Issue--Settlor's Intent, 27 Brooklyn L.Rev. 177). Other than that clarification, the Revisors' Notes indicate that the section merely codifies decisional law (Revisors' Notes to EPTL 1-2.10, McKinney's Cons. Laws of N.Y., book 17B, p. 22; see also, 9 Rohan, N.Y., Book 17B, EPTL 1-2.-10, p. 20).

Contemporary social mores and constitutional doctrine governing the rights of children born out of wedlock suggest that drafters now view the unmodified term issue to refer to children born both in and out of wedlock (see, Matter of Hoffman, 53 A.D.2d 55, 385 N.Y.S.2d 49, supra;

Matter of Lyden, 96 Misc.2d 920, 409 N.Y.S.2d 700; Matter of Leventritt, 92 Misc.2d 598, 400 N.Y.S.2d 298; Note,In Re Hoffman, 5 Hof.L.Rev. 697, 703-704), and we now hold this to be a rebuttable rule of construction. Respondent, however, who was adopted out of his biological family shortly after birth and has full inheritance rights through his adoptive family (EPTL 1-2.10; Domestic Relations Law § 117), can reap no benefit from this change of constructional rules. Unlike the child born out of wedlock who, but for the abrogation of the common-law presumption of exclusion, would have no right to inherit as the issue of any parent, what respondent, in effect, seeks here is inheritance rights as the issue of both his biological and his adoptive parents.

Powerful policy considerations militate against construing a class gift to include a child adopted out of the family. 1/ In detailing adoption procedures (see, Domestic Relations Law art. 7), the Legislature clearly intended that the adopted

child be severed from the biological family tree and be engrafted upon new parentage (see, Matter of Cook, 187 N.Y. 253, 260, 79 N.E. 991; Matter of "Wood" v. "Howe", 15 Misc.2d 1048, 1050, 182 N.Y.S.2d 992). Recognition of a right to inherit class gifts from biological kindred would be inconsistent with the child's complete assimilation into the adoptive family and thus contrary to legislative intent (see, Binavince, Adoption and the law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation, 51 Cornell L.Q. 152, 165).

Moreover, in order to encourage the adoptive relationship to flourish and solidify without outside interference, the Legislature has directed that the confidentiality of adoption records be maintained (Domestic Relations Law § 114). This secrecy, which we have identified as vital and beneficial to the entire adoption process (Matter of Walker, 64 N.Y.2d. 354, 360-361, 486 N.Y.S.2d 899, 476 N.E.2d 298; Matter of Linda F.M., 52 N.Y.2d 236,

239, 437 N.Y.S.2d 283, 418 N.E.2d 1302, appeal dismissed sub nom. Mason v. Abrams, 454 U.S. 806, 102 S.Ct. 79, 70 L.Ed.2d 76; see also, Alma Socy. v. Mellon, 2nd Cir., 601 F.2d 1225, cert. denied 444 U.S. 995, 100 S.Ct. 531,62 L.Ed.2d 426), would be easily breached if children who are adopted out of a family are presumed to be takers of class gifts from biological ancestors, as ascertaining whether rights of inheritance exist might well be good cause for access. This case itself is of moment for we can detect the hydraulic pressure faced by the adoption agency in passing on the request for disclosure.

Inclusion of adopted-out children within the ambit of class gifts would also undermine the stability of real property titles as well as other property rights passing under Surrogate's Court decrees ((see, former Surrogate Sobel's comprehensive analysis in Matter of Flemm, 85 Misc.2d 855, 859, 381 N.Y.S.2d 573, quoted with approval in Lalli v. Lalli, 439 U.S. 259, 270, 99 S.Ct. 518, 525, 58

L.Ed.2d 503). Finality of such decrees could never be achieved because there would always lurk the possibility, no matter how remote, that a secret out-of-wedlock child had been adopted out of the family by a biological parent or ancestor of a class of beneficiaries. No search conducted by a personal representative would ever by complete and there is obviously no way to cite and serve an out-of-wedlock child who is adopted out of the family when the survivors may not even be aware of the person's existence.

Domestic Relations Law § 117 certainly does not preserve the right to inherit a class gift in such circumstances. That section terminates all rights of intestate succession but does "not affect the right of any child to distribution of property under the will of his natural parents or their natural or adopted kindred" (Domestic Relations law § 117[2]). The evident purpose of the statutory provision, as expressed in the reports of the Bennett Commission on the law of Estates, was

"to place the adopted child for inheritance purposes in the bloodstream of his new family just as a natural child, and sever insofar as possible all connection with the natural family" (Second Report of Temporary State Comment on Modernization, Revision and Simplification of Law of Estates, 1963 N.Y. Legis.Doc., No. 19, at 25, 147, n.; see also, Legislation, New York's Law of Estates and Distribution: The New York Status of the Adopted Child, 38 St. John's L.Rev. 380). Thus, while a child adopted into a family is to be presumed included within the term issue "[u]unless a contrary intention is indicated" (EPTL) 1-2.10[a]; see, Matter of Park, 15 N.Y.2d 413, 260 N.Y. S.2d 169, 207 N.E.2d 859; Note, 15 Buffalo L.Rev. 209; Note, 11 NYLF 522), a child adopted out of the family is not(see, Binavince, op.cit., 51 Cornell LQ 152, 164-173). Only if a child adopted out of the family is specifically named in a biological ancestor's will, or the gift is expressly made to issue including those adopted out of the family, can the child take. In short, Domestic

Relations Law § 117 does not mandate that such a child receive a gift by implication.2/

We are aware of the passage of a bill designed to overturn the Appellate Division and Surrogate's Court holdings in this case as well as its subsequent veto by the Governor. The Governor's veto rested upon ambiguities in the bill and the lack of consensus within the legal community as to the best approach to the question (Veto Message No 106, 1984 N.Y.Legis.Ann, at 403). The Law Revision Commission, following a study, has recommended a new bill, which it has submitted for legislative consideration (1985 N.Y. Legis.Doc., No 65[N], 1985 McKinney's Session Laws of NY, at - [Pamphlet No. 3, June 1985, at A-554]). (Cf. Uniform Adoption Act § 14 [9 ULA Master ed]; Uniform Probate Code § 2-109[1] [8 ULA Master ed]; Ann., 96 ALR2d 639; Binavince,op. cit., 51 Cornell LQ 152.)

These developments, while of interest, are of no moment. Until this court has resolved an issue of

first impression, legislative activity or inactivity does not constitute an endorsement of the result reached by other courts (see, Brooklyn Union Gas Co. v. New York State Human Rights Appeal, Bd., 41 N.Y.2d 84,90,390 N.Y.S.2d 884,359 N.E.2d 393;cf. City of New York v. Saper, 336 U.S. 328, 338-340, 69 S.Ct. 554, 559-560, 93 L.Ed. 710; Flanagan v. Mount Eden Gen. Hosp.,24 N.Y.2d 427, 432-433, 301 N.Y.S.2d 23, 248 N.E.2d 871). Moreover, statutory enactments governing decendents' estates are generally not given a retrospective operation (McKinney's Cons.Laws of N.Y., Book 1, Statutes § 56;see, Monroney v. Mercantile-Saft Deposit & Trust Co., 291 Md. 546, 435 A.2d 788). Any legislative solution would thus be incomplete and the damage we perceive would result to public policy would be irreparable.

For the reasons stated, the order of the Appellate Division should be reversed, with costs to all parties filing briefs, payable out of the estate, appellant's motion for summary judgment granted,

respondent's motion for summary Judgment denied, and the matter remitted to Surrogate's Court, Westchester County, for the entry of a decree in accordance with this opinion.

JASEN, Judge (dissenting).

I would hold that statutory law and the unqualified use of the term "issue" in the testatrix's will compels the conclusion that her adopted-out grandson is entitled to an equal share of the trust fund the testatrix created under her will.

Adoption was unknown to the common law and is solely a creature of statute. (See, Matter of Robert Paul P.,63 N.Y.2d 233, 237, 481 N.Y.S.2d 652, 471 N.E.2d 424; Matter of Thorn, 155 N.Y. 140, 143, 49 N.E.661.) New York's adoption laws, first enacted in 1873, initially provided that an adopted child has no right of inheritance from the adoptive parents (L.1873, ch.830, § 10). Several years later, adopted children were granted such rights in a statute which did not, however, deny

any inheritance rights flowing from the natural parents (L.1887, ch. 703). With the enactment of the Domestic Relations Law in 1896, the Legislature was explicit in providing that an adopted child's "rights of inheritance and succession from his natural parents remain[ed] unaffected" (L.1896, ch. 272, § 64). This statutory provision was, however, ultimately amended in 1963 when virtually all inheritances to an adopted child from the natural family were terminated (L.1963, ch. 406 § 1). The Temporary State Commission on the Law of Estates which recommended the amendment noted that the underlying purpose of the statutory provision was "so far as possible" to place the adopted child within the bloodlines of his new family for inheritance purposes while severing such ties with his natural family. (See, L.1963, ch. 406, at 1788, n.) Since that time, Domestic Relations Law § 117(1) has included a provision that "the rights of an adoptive child to inheritance and succession from and through his natural parents shall

terminate upon the making of the order of adoption except as hereinafter provided." 1/ Because the laws regulation adoption and the rights of adopted children are entirely statutory and in derogation of the common law, the legislative provision must be strictly construed. (Matter of Robert Paul P., supra, 63 N.Y.2d at p. 238, 481 N.Y.S.2d 652, 471 N.E.2d 424; Matter of Malpica-Orsini, 36 N.Y.2d 568, 570, 370 N.Y.S.2d 511, 331 N.E.2d 486; Carpenter v. Buffalo Gen. Elec. Co., 213 N.Y. 101, 108, 106 N.E. 1026.) Consequently, the statutory termination of the adopted child's inheritance rights from his natural family must be read narrowly in light of the common law which permitted no such result. Indeed, in 1966, the Domestic Relations Law was again amended in order explicitly to indicate the limited extent to which inheritance rights were terminated and, thereby, clearly to delimit the extent to which the common law had been altered by the 1963 amendment. Section 117(2) has since provided that: "This section shall apply only to

the intestate descent and distribution of real and personal property and shall not affect the right of any child to distribution of property under the will of his natural parents or their natural or adopted kindred whether such natural parent or kindred shall have died heretofore or shall die hereafter or under any inter vivos instrument heretofore or hereafter executed by such natural parents or his or her kindred". (Emphasis added; L.1966, ch. 14 § 1.) The limited purpose of the 1963 amendment was thus clarified upon the recommendation of the Temporary State Commission. The enactment of section 117(2), as part of the 1966 "Act to amend the domestic relations law, in relation to intestate inheritance from and through an adopted child" (emphasis added), was expressly intended "to provide specifically that [section 117] does not affect any interest an adopted child might have under the will or inter vivos instrument of any member of his natural family, whether made before or after March 1, 1964." (See, L.1966, ch. 14, at 14, n.) 2/

Indeed, this court has recently emphasized, albeit in a different context, that section 117 was not intended to sever all ties between the adopted-out child and the natural family. In People ex re. Sibley v. Sheppard, 54 N.Y.2d 320,325,445,N.Y.S.2d 420, 429 N.E.2d 1049, we particularly noted that "the statute recognizes that [some] contacts may exist and that the natural relatives may desire to perpetuate the sense of family, for example, by bequeathing property to the adopted child (see Domestic Relations Law § 117, sub.2)." (Emphasis added) 3/ I would not, as the majority does, reconstrue section 117 so as to give an overly expansive reach to the provision in subdivision 1 which limits the adopted-out child's right of inheritance while, simultaneously, giving little or no effect to subdivision 2 which preserves a right which could not be alienated by means of adoption at common law, I believe it should be given a fuller application, more consistent with its expressly intended purpose. The foregoing is particularly true under the facts of this case. The

testatrix knew that her daughter gave birth to a nonmarital son who had been placed for adoption. Nevertheless, she included no provision in her will explicitly disinheriting this adopted-out grandson. To the contrary, she employed language which is strongly indicative of the opposite intention. The testamentary disposition in question provided that "upon the death of my daughter" the trust was to continue during the life of "issue her surviving". (Emphasis added). The testatrix expressed no qualification limiting the "issue" for whose benefit the testamentary trust was to be created.

As is acknowledged by the majority, the intention of the testatrix is the most fundamental and critical factor in construing her testamentary provisions. (Matter of Cord, 58 N.Y.2d 539, 544, 462 N.Y.S2d 622,449 N.E.2d 402; Matter of Jones, 38 N.Y.2d 189, 193, 379 N.Y.S.2d 55, 341 N.W.2d 565; Matter of Watson, 262 N.Y. 284, 293, 186 N.E. 787.) Here, the testatrix specifically employed the term "issue" without qualification, and there is no

indication whatsoever that she intended, by the use of the word "issue" in the will, anything other than that term's settled and customary meaning.

The EPTL defines "issue" without any restriction or exception for adopted-out children. The entire definition as codified in EPTL 1-2.10 both at the present time and when the will was executed, provides that:

"(a) Unless an contrary intention is indicated:

"(1) Issue are the descendants in any degree from a common ancestor.

"(2) The terms `issue' and `descendants', in subparagraph (1), include adopted children." (Emphasis added).

The statutory definition is unambiguous and unqualified,a nd nothing in testatrix's will renders

it less so. "Issue" includes all descendants, and there is simply no language in the testatrix's will indicating a "contrary intention". No distinction is made in either the statutory definition or the testamentary language between adopted-out and all other children. No specific individual is named or explicitly excluded in the will. Despite the testatrix's awareness of her adopted out grandson, no provision whatsoever was made to treat him differently than her daughter's other "issue surviving". In my view, the testamentary language is sufficiently clear and unequivocal to preclude this court's substitution of its own restrictive interpretation for a settled statutory meaning. (See, Matter of Watson, supra, at p. 293, 186 N.E. 787.) 4/

Finally, the policy considerations invoked by the majority do not appear relevant under the circumstances presented here. While the confidentiality of adoption records is a genuine concern of both the Legislature and this court (see, Domestic Relations Law § 114; Matter of

Walker, 64 N.Y.2d 354, 360-361, 486 N.Y.S.2d 899, 476 N.E.2d 298), the underlying purposes thus sought to be promoted are inapplicable to this case. The parties here have at all relevant times been aware of the identity and consanguinity of the testatrix's adopted-out grandson. Indeed, he was informed of his relationship to the testatrix by both his natural mother and adoptive parents prior to the commencement of this proceeding. Moreover, he communicated with his natural mother prior to her decease.

The general policy of confidentiality of adoption records out not to effectuate the denial of a lawful testamentary bequest to an adoptee whose adoption was known to the testatrix and about which the adoptee and all other interested parties are well aware. There is no need here for secrecy to protect the adoptee. Indeed, there is neither need nor request here to unseal adoption records, as the details relative to the adoption have all been stipulated. Inclusion of the testatrix's

adopted-out grandson within the class of her daughter's "issue" requires absolutely no contravention of the public policy invoked by the majority. Thus, the testatrix's testamentary language and the governing statutory provision being clear, and no compromise of a countervailing public policy being required to give them effect. the testamentary disposition ought not to be defeated.

Accordingly, it is my view that the Surrogate's construction of the term "issue" should not be disturbed, and the testatrix's adopted-out grandson was correctly held to be a beneficiary of the testamentary trust.

The order of the Appellate Division should be affirmed.

WACHTLER, C.J., and SIMONS, KAYE and ALEXANDER, JJ., concur with TITONE, J.

JASEN, J., dissents and votes to affirm in a separate opinion in which MEYER, J., concurs.

APPENDIX A

FOOTNOTES

MAJORITY OPINION

1/ Different considerations might apply in hybrid cases, such as where a child is adopted by two descendants in some degree from a biological parent or parents or by one such person and spouse who is a total stranger to the family. That question is not before us and we express no opinion on it.

2/ Without more there is no basis in the dissenters presumption that the testatrix intended to include the respondent, a child adopted out of the family, within a generic class entitled to inherit.

DISSENTING OPINION

1/ The phrase "adoptive child" was substituted for "foster child" in 1970, otherwise this particular provision of section 117(1) has remained unchanged since 1963 (see, L.1970, ch. 570, § 10).

2/ Similarly, in 1984 the Law Revision Commission acknowledged that under existing law adopted-out children may inherit under a will providing for dispositions to a class of persons such as "issue". In a recommendation to the Legislature concerning the inheritance rights of adopted-out children the Commission noted that:"Under present law, an adopted person cannot inherit in intestacy from or through natural kindred, except a natural parent who is married to an adopting step-parent or other person related by blood or marriage and the adopted child remained within the natural family unit (DRL § 117). Conversely, under such law, an adopted person may inherit or benefit as a member of class (i.e., "children", "issue", "nieces", "nephews")

named as beneficiaries under a will, or intervivos instrument, even when adopted out of the family by persons unknown to natural kindred and after the adoption papers have been sealed (DRL § 117 [subd.2]; Matter of Best, 116 Misc.2d 365 [455 N.YS.2d 487] [1982];Matter of Bissell, 74 Misc.2d 330 [342 N.Y.S.2d 718] [1973].)" (Emphasis added.) (1984 McKinney's Session Laws of NY, Memorandum of NY Law RE v Commn, at 3050.)

3/ We went on to state that: "the bulk of the statute refers to intestacy and succession. Where any mention of other rights and duties is made, it is only in the context of the natural and adoptive parents' parental duties (see, also, Domestic Relations Law z 110). Nothing in the statute purports to abrogate the interests of the grandparents, and the child, in continued contacts." (Id.)

4/ The nonmarital birth of the adopted out grandson provides no grounds for a different conclusion. The requirements of both statutory and constitutional law mandate that individuals born out of wedlock be treated equally with "issue" otherwise similarly situated. (See, e.g., EPTL 3-3.3[b]; 4-12; Levy v. Louisiana, 391 U.S. 68, 71, 88 S.Ct. 1509, 20 L.Ed.2d 436.)

APPENDIX B
ORDER GRANTING LEAVE TO APPEAL

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Fifth day of February A.D. 1985

PRESENT, Hon. Sol Wachtler, chief Judge presiding.

- - - -

ORDERED, that the said motion be and the same hereby is granted.

S/_____
Donald M. Sheraw
Clerk of the Court

APPENDIX C

ORDER OF APPELLATE DIVISION: SECOND DEPARTMENT

At a term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on October 26, 1984.

HON. JAMES F. NIEHOFF, Justice Presiding
HON. SEYMOUR BOYERS:
HON. CHARLES B. LAWRENCE: ASSOCIATE
HON. GERALDINE T. EIBER: JUSTICES

- -x
In the Matter of the Estate of Jessie C. Best
Deceased.

Anthony R. Reid,
Appellant,
David L. McCollum,
Respondent.
- -x

In the above entitled cause, the appellant having moved for leave to appeal to the Court of Appeals from an order of this court dated July 16, 1984 which affirmed a decree of the Surrogate's court, Westchester County, dated February 23, 1983;

Now, upon the papers filed in support of and in opposition ot the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby denied.

Enter:S/IRVING N. SELKIN
CLERK OF APPELLATE DIVISION

APPENDIX D
OPINION OF APPELLATE DIVISION:
SECOND DEPARTMENT DATED JULY 16, 1984

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

- x

In the Matter of Jessie C. Best,

Deceased.

Anthony R. Reid, Appellant;

David L. McCollum, Respondent.

- x

Appeal was taken from a decree of the Surrogates's Court, Westchester County, Evans V. Brewster, S., 116 Misc.2d 365, 455 N.Y.S.2d 487, holding that decendent's grandchild, who had born out of wedlock and adopted shortly after his birth was her issue. The Supreme Court Appellate Division, held that term "issue" in decendent's will placing residuary of her estate in trust with income paid to her daughter for life and then to her surviving "issue" including the child born out of wedlock and adopted shortly after his birth.

Affirmed.

Term "issue" in will providing for residuary of estate to be placed in trust with income paid to decendent's daughter for her life and then to her surviving "issue" included both child of her marriage and her child born out of wedlock who had been adopted by others shortly after his birth.

See publication Words and Phrases for other judicial constructions and definitions.

Carter, Ledyard & Milburn, New York City (Devereux Milburn and Pandia C. Ralli, New York City, of counsel), for appellant.

David S.J. Neufeld, Huntington, for respondent.

Before Niehoff, J.P. and BOYERS, LAWRENCE and EIBER, JJ.

PER CURIAM

Pursuant to the terms of the decedent's will, which was duly admitted to probate in Westchester County, the residuary of her estate

was to be placed in trust, with the income paid to decendent's daughter Ardith Reid for her life, and then to Ardith's surviving issue, with the remainder to be distributed outright to the succeeding generation. Ardith Reid Died on September 29, 1980, survived by appellant Anthony R. Reid, and by respondent David L. McCollum, Jr., who was born out of wedlock and was adopted shortly after his birth by David and Floy McCollum. Because the trustees began paying the income from the trust to appellant, but refused to make any payments to respondent, respondent petitioned the Surrogate for judicial settlement of the trustees' account and an order directing the trustees' to divide the trust fund into two parts and pay the income from one part to respondent, as directed by the will. Thereupon the trustees petitioned for judicial settlement of their account and a construction of the will with respect to the rights of appellant and respondent. Respondent's petition was apparently abandoned, and both filed objections to the accounting submitted by the

trustees, placing in issue their respective rights to the income from the trust fund. The Surrogate held that respondent's adoption did not affect his right to inherit under the will of his natural ancestor, and that in the absence of any indication of a contrary intent on the part of the testatrix, the term "issue" , unmodified, applies to "nonmarital" as well as "marital" descendants. He therefore directed that respondent be afforded a share in the trust equal to that of appellant, pursuant to the directions of the testatrix.

We agree with the reasoning of the Surrogate, 116 Misc.2d 365, 455 N.Y.S.2d 487, and therefore affirm. Adoption, and the relationship between the adopted child and his adoptive and natural kindred, is solely the creature of statute (see People ex re. Sibley v. Sheppard, 54 N.Y.2d 320, 445 N.Y.S.2d 420, 429 N.E. 2d 1049). The only statute which restrict the right of an adopted child to inherit from his natural kin, does not apply, by its very terms, to inheritance under the

will of a natural relative (Domestic Relations Law § 117). Respondent's status as an adopted child therefor does not affect his right to the benefit of the trust, if he is considered the "issue" of his natural mother as the term is used in the will of decendent, his natural grandmother.

The court of this state, including this court, held for many years that where the term"issue" was used, unmodified, in a testamentary instrument, it was presumed, in the absence of evidence to the contrary, that the testator meant only marital, or "legitimate", issue (see Collins v. Hoxie, 9 Paige Ch, 81; Central Trust Co. v. Skillin, 154 App.Div. 227, 138 N.Y.S. 884; Matter of Underhill, 176 Misc. 737, 28 N.Y.S.2d 984). In 1976, however, in Matter of Hoffman, 53 A.D.2d 55, 65, 385 N.Y.S.2d 49, the Appellate Division, First Department, reversed this presumption, stating as the new rule, the following:

"[W]e reject the rule that where the word "issue", standing alone, appears in a will, it will be interpreted to include within its meaning only lawful descendants. We hold that the word "issue" should be construed to refer to legitimate and illegitimate descendants alike in the absence of an express qualification by the testatrix."

Because we agree with the reasoning set forth in the opinion of Justice Birns in Matter of Hoffman (supra), we hold that the Surrogate properly applied the presumptionestablished therein in the case at bar.

The presumption is, of course, rebuttable. We have considered the evidence submitted to the Surrogate, however, and find it inconclusive with respect to the intent of the testatrix and therefore insufficient to overcome the presumption that the respondent is entitled to share equally with the appellant in the trust.

We have considered the parties' remaining contentions with regard to the respective rights of appellant and respondent and have found them to be without merit. Therefore, the Surrogate was correct in holding that respondent is entitled to an interest in the trust income equal to that of appellant, and directing the trustees to comply with the terms of the will with respect to his interest.

In addition, the Surrogate was within his discretion in directing that the attorneys' fees resulting from the instant construction proceeding be paid from the corpus of the trust as a whole (see Matter of Ablett, 3 N.Y.2d 261, 165 N.Y.S.2d 63, 144 N.E.2d 46).

Decree of the Surrogate's Court, Westchester County, dated February 23, 1983, affirmed, with costs payable personally by the appellant.

NIEHOFF, J.P., and BOYERS, LAWRENCE and EIBER, JJ.,concur.

APPENDIX E

OPINION OF THE WESTCHESTER COUNTY SURROGATES COURT, DATED OCTOBER 8, 1982

Accounting of Andrew Ian Cook and Morgan Guaranty Trust Company of New York as Trustees under the last WILL and Testament of Jessie C. BEST, Deceased, and Construction of said will with respect to the continued administration of the trust under article Tenth thereof.

In intermediate trustee's accounting, petitioners requested a construction of an article of testatrix' will to determine the identity of the person or persons entitled to income as secondary life beneficiary of the trust. The Surrogate's Court, Westchester County, Evans V. Brewster, S., held that the nonmarital child of testatrix' daughter who was adopted out of family was not excluded from the class of "issue" of testatrix' daughter and, therefore, was entitled to an equal share of the trust fund.

Ordered accordingly.

Cusack & Stiles, New York City, for petitioner.
David S.J. Neufeld, Huntington, for respondent.
Carter, Ledyard & Milburn, New York City, for respondents.

DECISION

EVANS V. BREWSTER, Surrogate.

In this intermediate trustees' accounting, the petitioners have requested a construction of Article Tenth of decedent's will to determine the identity of the person or persons entitled to income as secondary life beneficiary of the trust.

The decendent died on November 5, 1973. In her will dated July 27, 1973, Article Tenth directed that the residuary estate be held in trust with the income therefrom payable to decedent's daughter during her lifetime. Upon her death (which occurred on September 27, 1980) the trustees were directed "to divide said trust fund into as many shares or parts as there shall be issue. per stirpes and not per captia, and to continue to hold each of such part or parts in trust during the lifetime of one of said persons." In the instant

proceeding, an alleged nonmarital child of decedent's daughter who was adopted out of the family shortly after birth, has appeared and seeks to share the trust equally with the only marital child.

In 1976, the executors became aware that in addition to a marital child, decedent's daughter had given birth to a nonmarital child in 1952 who had been surrendered for adoption shortly after birth. Counsel to the executors advised that the nonmarital child be made a part to their accounting. Thereafter they were authorized by decedent's daughter to initiate a search for the non marital child and successfully traced him through the adoption agency which had placed the child for adoption. The adoptive parents were advised of the circumstances of the search and after consultation with the child chose to disclose their identities. The nonmarital son was then made a party to the accounting proceeding along with the marital child. Neither the attorney for the

nonmarital child nor the guardian ad lit em representing the marital child, an infant at that time, filed objections. On March 20, 1977, a decree made approving the account, funding the trust, and discharging the executors. From that date until her death in 1980, decedent's daughter received all of the income from the trust as the primary income beneficiary under the will. Upon death, income was then paid to the marital child but withheld from the nonmarital child who thereupon filed a petition to compel an accounting by the trustees thereby presenting the issue of his status to the court. The trustees filed an intermediate account because of the death of the primary income beneficiary and in their petition requested a construction of the will to determine the proper secondary income beneficiary or beneficiaries thereunder. In this proceeding, the parties are virtually the same as those in the executors' accounting proceeding.

The marital son has filed objection placing in issue the identity of the alleged nonmarital son as well as his status as issue of the decedent under the will after his adoption. The nonmarital son has filed objection in which he asserts that since the executors' accounting recognized his status as issue. it is res judicata and the executors are estopped from denying his identity and status. He further argues that the adoption does not affect his right to inherit from his natural family because as a matter of law "issue" as used in the will includes nonmarital children unless otherwise specifically excluded. Both parties have moved for summary judgment on the issues presented. In support of the motions for summary judgment, affidavits have been submitted. The parties have stipulated (1) that these affidavits may be considered by the court in deciding the motions; (2) that had these individuals testified at a hearing in connection with the pending motions, the testimony given by each of the individuals would have been consistent with and substantially

the same as the contents of their affidavits; (3) that for the purpose of the pending motions for summary judgment the objectant nonmarital child is the son of decedent's daughter and is in the bloodline of the decedent; and (4) that the decendent first became aware of the nonmarital son of her daughter at the time of birth.

The parties having stipulated, for the purpose of the pending motions, that the objectant nonmarital child is the nonmarital child of decendent's daughter and in decendent's bloodline, the court need not address that issue.

The contention that the rights and status of the parties were determined in the executors' accounting cannot be sustained. Allegatons made by the executors in their petition to account, the listing in a petition of parties alleged to have an interest in a decedent's estate or statements made by a guardian ad lit em in his report, are not judicial determinations and are not binding in fact

or in law unless a decree is made with respect to the same (Matter of Knapp, 141 Misc. 540, 253 N.Y.S. 409). A decree is binding upon all parties only as to matters contained within the account or specifically addressed by the court. The only matters considered in the executors' accounting were the settlement of the account, the funding of the residuary trust and the discharge of the executors. No issue was presented for determination of the right of any person to a share in the trust and no determination of the parties entitled to a secondary income interest was made by the court. The accounting decree dated May 20, 1977 ordered payment of various administration expenses and ordered the executors "to distribute the principal balance remaining after the aforesaid payments have been made" to the fiduciaries "as trustees of the trust created under Paragraph Tenth of the Last Will and Testament of the decedent" The court did not address itself to the question of who would be secondary income beneficiaries since such

beneficiaries had at best contingent interests during the lifetime of the primary life beneficiary. Further , no stipulation, understanding or agreement between the parties would be binding or effective without court approval since the interest of an infant was involved (SCPA 2106). The affirmative defenses of res judiciata and estoppel are without merit and are dismissed.

Whether or not an adopted child may take as "issue" of the natural family from which he was "adopted out" is the crux of the present proceeding. Cases decided prior to the changes made in the Domestic Relations Law by Laws of 1963, Ch. 406 and Laws of 1966 Ch. 14 are no longer applicable. REsearch has failed to disclose any subsequent decisions in New York which address this issue.

The effect of an adoption is set forth in Sec. 117 of the Domestic Relations Law which provides, in so far as pertinent, as follows:

1. After the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated.

"the rights of an adoptive child to inheritance and succession from and through his natural parents shall terminate upon the making of the order of adoption except as hereinafter provided.

* * * * * *

"2.This section shall apply only to the intestate descent and distribution of real and personal property and shall not affect the right of any child to distribution of property under the will of his natural parents or their natural or adopted kindred whether such natural parent or kindred shall have died hereto fore or shall die hereafter or under any inter vivos trust heretofore or

hereafter executed by such natural parent or his or her kindred."

* * * * * *

The right of the adoptive child to inherit from and through his natural parent was for the first time eliminated by the amendment made to Domestic Relations Law Se. 117. The Legislative note appended to the amendment, Ch, 406 Laws of 1963, stated that the purpose of the change, recommended by the Temporary State Commission on the Law of Estates, was to carry out a public policy of placing the adopted child as far as possible within the bloodlines of his new family for inheritance purposes and was intended to establish that the adopted child will inherit from his foster parents and their kindred. At the same time, all inheritances by the adopted child from his natural family were terminated severing all ties with the natural family. The only exception specifically provided for was where a natural parent

remarries and consents to the adoption of the child by the spouse in which case, the right of the adopted child to inherit from and through the consenting natural parent remained unaffected by the adoption.

"The adoptive relationship...is solely the creature of statute, unknown to the common law (Betz v. Horr, 276 N.Y. 83, 11 N.E.2d 548). Having created the adoptive relationship, the state should be allowed to determine to what extent the child's contacts with its natural family will be ended.: People ex rel Sibley v. Sheppard, 54 N.Y.2d 320, 327, 445 N.Y.S.2d 420, 429 N.E.2d 1049. The language of the statute discloses a clear intent that upon adoption, the adoptive child is placed within the bloodlines of his or her new family for inheritance purposes and that all inheritance by such adopted child from the natural family is terminated. (Matter of Nelson, 107 Misc.2d 1035, 436 N.Y.S.2d 594; Matter of Blake, 62 Misc. 2d 276,307 N.Y.S.2d 789). However, the legislature

did not terminate and void all ties with an adopted child's natural relatives for it adopted Section 2 of Domestic Relations Law 117. In adopting Section 2 of Domestic Relations Law 117, the legislature had before it for consideration the note of the Commission on the Law of Estates, which was appended to their recommendation of the adoption of amendments of Domestic Relations Law Sec. 117 of 1966 which stated in part: "This act is also intended to provide specifically that it does not affect any interest an adopted child might have under the will or inter vivos instrument of any member of his natural family, whether made before of after March 1, 1964." The court has been unable to discover any evidence whatsoever that the intent of the legislature in adopting the amendment was not identical to that stated by the Commission on the Law of Estates.

In the matter now before the court, the trust created under Article Tenth of the will provides the "(u)upon the death of my daughter, Ardith

Reid, leaving issue her surviving", the trust shall continue during the life of such issue. Ardith surrendered her nonmarital child for adoption. Upon the completion of that adoption, such nonmarital child's relationship to Ardith was severed and he no longer could be considered as issue of Ardith. In effect, the adopted-out child is a stranger to his natural parents (Betz V. Horr, 276 N.Y. 83, 11 N.E.2d 548; Matter of Pierro, 173 Misc. 123, 17 N.Y.S.2d 233). The more complicated question is whether a nonmarital child, born in 1952, given up for adoption out of the family shortly after birth and adopted by strangers, who had no knowledge of and no contact or relationship with his natural mother or her mother and her kindred prior to the decedent's (grandmother) death in 1973, is within the class entitled to participate in a disposition to "issue" in the grandmother's will.

It is argued on behalf of the marital grandchild of decedent that where adoption out of the family

through an authorized agency occurs, the secrecy involved in the proceeding, the sealing of the records and withholding the same from inspection is indicative of a public policy to insure the protection of the adoptive parents and child from interference by a natural parent, the protection of privacy of the natural parent, and to cut off all relationships of the natural family with the child. In contrast to this, it is asserted that where private placement adoption takes place, the records are not sealed, the parties are all known to each other an it is only in this type of case that the reservation of right set forth in Sec. 117 sub. 2 of the Domestic Relations Law applies. The statute itself, however, makes no such distinction. The termination of the rights of an adoptive child to inheritance or succession from and through his natural parents applies only to intestate descent and distribution. The statute specifically excepts the distribution of property under the will of the natural parents or their natural or adopted kindred. "Adoption is a status created by the

State. Since it is entirely statutory and in derogation of the common law, adoption statutes must be strictly construed. (Matter of Santacose, 271 App.Div. 11, 16, 61 N.Y.S. 2d 1, 2 N.Y. Jur, Adoption Sec. 3)." Matter of Adoption of Pyung B., 83 Misc.2d 794, 796, 371 N.Y.S.2d 993. Over the course of years, the legislature has placed the adopted child as far as possible within the bloodlines of his new family for inheritance purposes. At the same time it did not deprive the adopted child from inheritance from his natural family until the enactment of Ch. 406 of the Laws of 1963, New York, when the law which terminated the intestate descent and distribution of an adopted child from and through his natural parents was enacted. In the very recent case of People ex rel. Sibley v. Sheppard, 54 N.Y.2d 320, 445 N.Y.S.2d 420, 429 N.E.2d 1049, in which visitation rights by a maternal grandparent after adoption by the paternal grandparent were at issue, the court discussed various aspects of Domestic Relations Law Sec. 117. The court

stated, "the adoptive relationship however, is solely the creature of statute, unknown to the common law (Betz v. Horr, 276, N.Y. 83, 11 N.E.2d 548.) Having created the adoptive relationship, the State should be allowed to determine to what extent the child's contacts with its natural family will be ended." (P.327, 445 N.Y.S2d 420, N.E.2d 1049) The court also stated , "An adopted child may not in all respects be isolated from his or her natural family. Some may perceive an inconsistency in the termination of some rights, but not others, between the adoptive child and the natural family. If such exists, the desire for consistency in the law should not of itself sever the bonds between the child and the natural relatives." (P. 326, 445 N.Y.S.2d 420, 429 N.E.2d 1049) The court recognized that where the adoption is within the family, the parties are all known to each other and there is an awareness in the family of the relationship, Where adoption is out of the family through an agency and secrecy of the parties is maintained, perhaps a different

rule should be applied since the child is then cut off from all contact with the natural family. The legislature presumably was aware that in enacting the amendment of Domestic Relations Law Se. 117 the rights of the adoptive child, whether out of family or in family adoption, were terminated but only with respect to "intestate descent and distribution of real and personal property." The marital grandchild respondent urges that cases in other jurisdictions which determined that a child in an out of family adoption was not entitled to distribution under the terms of a will of a member of his natural ancestors ar applicable.

In the Estate of Russell, 17 Cal. App.3d 758, 95 Cal.Rptr. 88, in holding the relationship of the child adopted out of his family severed the right to inherit, the court considered the California Probate Code Sec. 257 which provided specifically that an adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by adoption nor to

the estate of a relative of the natural parent. LIkewise, in the case of Stamford Trust Co. v. Lockwood, 98 Conn. 337, 119 A. 218, the decision was based upon the Connecticut General Statute, Chap. 778, Adoption Sec. 45-64a, which terminates the relationship of natural parents and relatives for all purposes including inheritance. In North Carolina, in Crumpton v. MItchell, 303 N.C. 657, 281 S.E.2d 1, the Supreme Court in finding that North Carolina General Statute 48-23 which provides in part that the entry of a final order of adoption relieves the child's natural parents off all legal duties and obligations formerly due the child, concluded that the Legislature had intended to make the adopted child legally a stranger to the bloodline of his natural parents just the same as had been specifically provided in General Statute Se. 29-17, in cases of intestacy. See also First National Bank of Oregon v. Schwerin, 54 Or.App. 460, 635 P.2d 388. However, unlike the laws off the jurisdictions, the statute in New York is clear and states without equivocation that Domestic

Relations Law Se. 117 applies only to intestate descent and distribution and does not affect the right to a distribution of property under a will or intervivos instrument. Until such time as the New York Legislature terminates the relationship of the adopted child and his natural family for all purposes whatsoever, the right to inherit under the will of the natural parents or kindred must be given effect regardless of whether the adoption was out of the family or not.

Two other grounds are urged by the natural grandchild for a finding in his favor. First, that at the time the will was made, the courts interpreted the word "issue" to mean "lawful issue" so that testator's use of the word in her will was intended only for lawful issue of her daughter. Further that the word "issue" in and of itself creates a latent ambiguity as to its proper meaning where adopted children or nonmarital children are involved. Since it is the true intent of the testatrix that the court must determine, a hearing is requested to

present proof to ascertain the intent of testatrix in the language used in the will. In view of the stipulation providing the affidavits of various individuals, a hearing in unnecessary.

In Matter of Hoffman, 53 A.D.2d 55, 385 N.Y.S.2d 49, the court said "we reject the rule that where the word "issue", standing alone, appears in a will, it will be interpreted to include within its meaning only lawful descendants. We hold that the word "issue" should be construed to refer to legitimate and illegitimate descendants alike in the absence of an express qualification by the testatrix." P.65, 385 N.Y.S.2d 49, See also Matter of Leventritt, 92 Misc. 2d 598, 604, 400 N.Y.S.2d 298. There are no qualification expressed in the will with respect to the "issue" surviving decedent's daughter. As used in the will, it describes a class of persons who amy be the secondary income beneficiaries of the trust. Under EPTL 1-2.10, issue is defined as the descendants in any degree from a common ancestor, unless a

contrary intention is indicated. "The well-established rule is that the court construe language used in wills by reference to the testator's intended meaning. (Matter of Jones, 38 NY2d 189 [379 N.Y.S.2d 55, 341 N.E.2d 565]; Matter of Thall, 18 NY2d 186 [273 N.Y.S.2d 33,219 N.E.2d 397]). This intention is to be ascertained from a reading of the four corners of the will. (Matter of Kosek, 31 NY2d 475 [341 N.Y.S.2d 593, 294 N.E.2d 188].)" Matter of Lyden, 96 Misc.2d 920, 921, 409 N.Y.S.2d 700. There is no language in the will itself suggesting an intention differe from that defined by statute should be given to the word "issue".

The testimony of various individuals having knowledge of the circumstances of the birth of the nonmarital child and the preparation and execution of decedent's will, submitted in affidavit form by stipulation, establishes without question that the decedent was aware of the pregnancy of her daughter, the birth of the non marital son and

his subsequent adoption. The decedent took no action to remove the nonmarital son from her will. While she may have been reluctant to acknowledge the existence of the birth of a nonmarital child to her daughter, an intent to exclude such child was not written into her will. It could easily have been included in her will by the simple direction that the bequest to her daughter's issue be limited to "issue of a lawful marriage" of similar language which would not acknowledge or suggest that there was in fact a nonmarital child. Her failure to state her intention to disinherit the nonmarital child under the circumstances of her knowledge of the existence and adoption of such child, overcomes any inference of intent to disinherit which might arise from the secrecy which she maintained concerning the birth of a nonmarital child to her daughter.

Accordingly, the court determines that the "issue" of the decendent's daughter entitled to an equal share of the trust fund as income beneficiaries of

the trust fund as income beneficiaries of the trust created under Article Tenth of the will are the nonmarital as well as the marital children of the daughter.

The court is not oblivious to jurisdictional problems which exist by virtue of the failure of the legislature to totally sever the rights of adopted out children to inherit, through intestacy or through a will or inherit, through intestacy or through a will or inter vivos trust from or through its natural or biological parents. The existence of an adopted out child creates no problem in a proceeding to probate a will nor is there a jurisdictional problem in any proceeding involving a will in which persons receiving a distribution under the will are specifically named or in which adopted out children are specifically excepted from a class or from receiving any distribution under the will.

Where, however, as in this decedent's will, a child is adopted out of the family and the will directs distribution to a class of which the adopted out child would be a member, the failure to cite such adopted out child results in a failure to achieve complete jurisdiction. As the existence of an adopted out child may not be known to biological kindred of the adopted out child making a will directing distribution to a class, a careful will draftsman must protect against this contingency to avoid a possible failure of jurisdiction in a subsequent proceeding.

Not only does the statute create jurisdictional problems but is presents a reason to seek to breach the privacy of adoption proceedings which the legislature has provided the adopted child, the natural parents and the adoptive parents. It is not unreasonable to anticipate that resourceful adopted children, learning of this statute, will seek to break the seal and open their adoption proceedings to obtain the names of their natural

parents and their kindred with a view to obtaining information which will lead them to wills of biological kindred which contain directions for distribution to a class of which they are members.

Legislative study of this statute is urged with the view to the enactment of an amendment to the existing statute which will clearly limit the adopted out child's interest in decedents' estates to the bloodline of his adoptive parents except in those instances when a will of a biological kindred disclosed in clear language and intention to distribute a portion of the estate to the adopted out child. To continue the existing statute without amendment will give rise to litigation, delays in the settlement of estates and the distribution of property to persons not only unknown to a testator but to unintended beneficiaries.

The motion for summary judgment on behalf of the nonmarital respondent is granted and the cross motion by respondent marital son is denied. The

request for attorney fees will be held in abeyance until the decree is made herein. The attorneys should submit detailed affidavits of services rendered in which the amounts requested are stated.

APPENDIX F
ORDER OF THE NEW YORK STATE COURT OF APPEALS

NEW YORK STATE COURT OF APPEALS

- - - -

APPENDIX G

ORDER OF NEW YORK STATE OF APPEALS DENYING MOTION FOR REARGUMENT

Court of Appeals
of the State of New York

In the Matter of JESSIE C. BEST,

----------x

DAVID L. McCOLLUM, Respondent

-against-

ANTHONY R. REID,

Petitioner

----------x

Dated; December 26, 1985

Motion for reargument denied with $20.00 costs and necessary reproduction disbursements.

APPENDIX H

STIPULATION

Surrogate's Court
County of Westchester

- -x
Accounting of ANDREW IAN COOK and MORGAN GUARANTY
TRUST COMPANY OF NEW YORK as Trustees under the last
Will and Testament of

JESSIE C. BEST,

Deceased,

And construction of Said Will with Respect to the continued Administration of the Trust under Article
TENTH Therof.
- -x

STIPULATION
File No.
3830-1973

It is HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties that:

1. The affidavits previously submitted by the parties in connection with the pending motions for summary judgment, may be considered by the Court for the purpose of deciding the pending motions for summary judgment; and

2. Had the individuals who submitted such affidavits testified at a hearing in connection with the pending motions the testimony given by each of those individuals would have been consistent with and substantially the same as the contents of their affidavits; and

3. For the purpose of the pending motions for summary judgment, David Lawson McCollum Jr. is the non-marital son of Ardith K. Reid and, accordingly, is of the bloodline of Jessie C. Best and Ardith K. Reid; and it is agreed that Jessie C. Best first became aware of the birth of such non-marital son at the time of the birth of such non-marital son to Ardith K. Reid.

Dated: September 23, 1982

/S/

LAW OFFICES OF
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/S/

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APPENDIX I

LETTER TO MRS. BOYD DATED AUGUST 5, 1976

CUSACK & STILES
ATTORNEYS AT LAW
61 Broadway
New York, NY 10006

August 5, 1976

ESTATE OF JESSIE C. BEST
Re Robert Kurner

Dear Mrs. Boyd:

We are the attorneys for Andrew Ian Cook and Morgan Guaranty Trust Company of New York as Executors of the Last Will and Testament of Jessie C. Best, deceased. Mrs. Best was the mother of Ardith Kurner, now know as Ardith Reid. We have recently been advised that Mrs. Reid has a child in 1952 to whom she gave the name Richard Durner. We understand that this child was born at Flower and Fifth Avenue Hospitals and was shortly after his birth placed with Sheltering Arms Child Service, Inc. for adoption. This child has a substantial interest under the Last Will and Testament of his deceased grandmother, Jessie C. Best.

Mrs. Best died on November 5, 1973 leaving a last Will and Testament which was duly admitted to probate in the Surrogate's court, Westchester County, New York on November 28, 1973 (File No. 3830-1973). For your information, I enclose herewith a copy of the decendent's Will. In examining this instrument, you will note that the decendent provided in paragraph TENTH thereof for the disposition of her residuary estate. Her daughter, Ardith Reid (formerly Ardith Kurner), survived Mrs. Best and accordingly the provision of subparagraph (a) of that paragraph TENTH are applicable. In accordance with those provision, a trust has been established o the residuary estate with income payable to Mrs. Reid during her lifetime and thereafter with the trust being continued during the lifetimes of Mrs. Reid's issue. When fully funded, the primary trust will have a value in excess of $1,000,000.

In addition to Robert Kurner, Mrs. Reid has one child, Anthony R. Reid. Under these

circumstances, following Mrs. Reid's lifetime, Robert Kurner will be the income beneficiary of a trust of approximately $500,000.

The Executors of the Last Will and Testament of Jessie C. Best are in the process of filing with the Westchester County Surrogate's Court a final account of their proceedings as Executors. In connection with that proceeding, it will be necessary for us to serve citation upon all of the interested parties including Robert Kurner. Your assistance in locating Mr. Kurner would be appreciated.

If you or your attorneys should desire any additional information in this matter, please contact the undersigned. In may absence, you may speak with Mr. Thomas J. Mitchell of this office.

Very truly yours,

James F. O'Brien

Mrs. Florence Boyd,
Director of Adoptions
Sheltering Arms Child Service, Inc.
122 East 29th Street
New York, N.Y. 10016

JOB:VS
Encl.

EXHIBIT J

LETTER TO DAVID MCCOLLUM DATED SEPTEMBER 14, 1976

CUSACK & STILES
ATTORNEYS AT LAW
61 Broadway
New York, New York 10006

September 14, 1976

ESTATE OF JESSIE C. BEST

Dear Mr. McCollum:

In accordance with an Order issued out of the Surrogate's Court of Westchester County, New York, I am serving upon you by mail a copy of the citation for the judicial settlement of the accounts of the Executors of the Last Will and Testament of you grandmother, Jessie C. Best. I invite your attention to the footnote to the Citation that you have the right to have an attorney at-law appear on your behalf. If at this time you do not wish to appear in person but would want to have an attorney in North Carolina consider your interest in the estate, you may have such attorney communicate with me.

Under her Will, your grandmother directed that her residuary estate be held in trust with income from the trust fund payable to your mother, Ardith K. Reid, during her lifetime. The Will also provides that following you mother's lifetime the trust fund is to be divided into as many shares or parts as there shall be issue of you mother surviving upon her death. Your mother has a second child, Anthony R. Reid, who was born on July 3, 1963 and for whom the Court will appoint an attorney to protect his interest in the estate.

I shall advise you of any developments in the accounting proceeding.

Very truly yours,

Mr. David Lawson McCollum, Jr.
1404 Craighead Road West
Charlotte, North Carolina 28206

JOB:VS
Encl.

No. 85-1249 (2)

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID L. McCOLLUM,

Petitioner,

-against-

ANTHONY R. REID,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review a state court decision by writ of certiorari when Petitioner's constitutional claims were not raised or decided in the state court.

2. Whether the New York Court of Appeals deprived Petitioner of his rights under the Constitution of the United States by the "judicial modification of an unambiguous statutory definition" in determining that Petitioner, having been adopted out of his biological family at birth, is not "issue" within the meaning of his biological grandmother's will.

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No. 85-1249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID L. McCOLLUM,

Petitioner,

-against-

ANTHONY R. REID,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

CITATIONS TO THE OPINIONS AND ORDERS IN THE COURTS BELOW

The petition herein (the "Petition") is for a writ of certiorari to the Court of Appeals of the State of New York. The order of remittitur of the Court of Appeals, dated October 24, 1985, reversed an order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which had affirmed a decree of the Surrogate's Court of Westchester County, New York.

1. The order of the Court of Appeals dated December 26, 1985, denying reargument appears at page A-63 of the Appendix to the Petition.

2. The order of the Court of Appeals dated October 24, 1985, reversing the order of the Appellate Division appears at page A-62 of the Appendix to the Petition.

3. The opinion of the Court of Appeals was reported at *Matter of Best*, 66 N.Y.2d 151, 485 N.E.2d 1010, 495 N.Y.S.2d 345 (1985).

4. The Order of the Court of Appeals dated February 5, 1985, granting leave to appeal was reported at 64 N.Y.2d 605, 486 N.Y.S.2d 1025, and appears at page A-25 of the Appendix to the Petition.

5. The order of the Appellate Division dated July 16, 1984, affirming the decree of the Surrogate's Court appears at page A-27 of the Appendix to the Petition.

6. The opinion of the Appellate Division was reported at *Matter of Best*, 102 A.D.2d 660, 477 N.Y.S.2d 431 (2d Dept. 1984).

7. The opinion of the Surrogate's Court of Westchester County was reported at *Matter of Best*, 116 Misc. 2d 365, 455 N.Y.S.2d 487 (1982).

The transcriptions of the opinions of the Court of Appeals, Appellate Division and Surrogate's Court in the Appendix to the Petition have minor omissions of words and citations, and we request this Court to rely instead upon the published reports of those opinions.

STATEMENT OF THE CASE

The case decided the following question of New York law: Is a child whose mother surrendered him at birth for adoption by strangers presumed to be included in a class gift to "issue" in his biological grandmother's will? The lower courts said yes. The Court of Appeals said no.

In 1952 Ardith Kurner, later Ardith Reid ("Ardith"), gave birth to a son out of wedlock. Petitioner claims to be that son, and solely for purposes of the will construction at issue here, it has been stipulated that he is. Ardith placed Petitioner with an agency for adoption immediately after his birth. Ardith's mother, Jessie C. Best ("decedent"), knew of Petitioner's birth and placement for adoption. In 1960 Ardith married William R. Reid. They had one child, Anthony R. Reid ("Respondent"), born in 1963.

Decedent died in 1973. From 1952 until decedent's death neither decedent nor Ardith had any contact with Petitioner. They did not know his name, or where he lived, or who had adopted him, or whether he was dead or alive.

In her will, decedent left her residuary estate in trust for Ardith. Article TENTH (A) of the will instructed the trustees:

> "Upon the death of my daughter, ARDITH REID, leaving issue her surviving, to divide said trust fund into as many shares or parts as there shall be such issue, *per stirpes* and not *per capita*, and to continue to hold each of such shares or parts in trust during the life of one of said persons."

If Petitioner were counted as "issue" of Ardith within the meaning of the will, he would be the beneficiary of a continuing trust of one-half the fund. If not, the entire fund continues in trust for Respondent.

Decedent treated Petitioner's birth and adoption as a family secret and did not even tell the attorney who drafted her will

of Petitioner's existence. Three years after decedent's death, Ardith divulged to decedent's co-executor and co-trustee, Morgan Guaranty Trust Company of New York, the circumstances surrounding Petitioner's birth and adoption. Through the efforts of Sheltering Arms Children's Services and the use of detectives, the executors located Petitioner and made him a party to the accounting for decedent's estate. As Ardith was still alive, in the executors' accounting it was not necessary to determine who succeeded to the trust property after her death.

Ardith died in 1980. Her death made it necessary to determine whether Petitioner was included in the class of "issue" under decedent's will. The trustees raised this question in their petition on the trustees' accounting, asking the court to construe decedent's will. Both Petitioner and Respondent filed objections to the account. Petitioner moved for summary judgment determining, *inter alia*, that he was a beneficiary under the will. Respondent moved to dismiss Petitioner's motion and cross-moved for summary judgment determining, *inter alia*, that Petitioner was not a beneficiary under the will. The Surrogate's Court granted Petitioner's motion. The Appellate Division affirmed. The Court of Appeals reversed and granted Respondent's motion.

The interpretation of decedent's will involved both the canons of will construction and evidence of decedent's intent.[1] The Surrogate's Court and the Appellate Division held that an adopted-out child is presumed to be included in a class gift to issue in a biological ancestor's will, and that the evidence of decedent's intent did not overcome that presumption. The Court of Appeals held that an adopted-out child is presumed not to be included

---

[1] The evidence of decedent's intent was in the form of affidavits. At the request of the Surrogate's Court, the parties entered into a stipulation that (i) if the individuals whose affidavits were submitted in support of the motion and cross-motion for summary judgment testified at a hearing, such testimony would have been consistent with and substantially the same as the contents of their affidavits, and (ii) for the purposes of the will construction only, Petitioner is Ardith's son born out of wedlock. Appendix to Petition, p. A-64.

in a class gift to issue in a biological ancestor's will, and that the evidence of decedent's intent did not overcome that presumption.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction under 28 U.S.C. §1257(3) and Supreme Court Rule 21.1(h) to grant a writ of certiorari because Petitioner did not make his constitutional claims in the state courts below.

II. The Petitioner's purported constitutional claims are grounded solely in a disagreement with the Court of Appeals over its construction of a state statute and raise no genuine issue of constitutional or federal law.

ARGUMENT

I. Petitioner Did Not Make His Constitutional Claims In The Courts Below.

Petitioner asserts jurisdiction to grant the writ on the basis of 28 U.S.C. §1257(3), which provides in pertinent part that a final judgment or decree of a State's highest court may be reviewed:

> "(3) By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

At no time in this proceeding did Petitioner claim that a decision that by reason of his adoption out he ceased to be "issue" of his biological ancestors would deny him his constitutional or other federal rights. The claim was not raised even upon petition for reargument before the Court of Appeals. In such a case this Court has long held that it lacks jurisdiction to grant the

writ. *Webb v. Webb*, 451 U.S. 493 (1981). The jurisdictional defect under 28 U.S.C. §1257(3) is that Petitioner has not "set up or claimed" his federal right prior to petitioning this Court. *See Webb v. Webb*, 451 U.S. at 495. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *Accord, Tacon v. Arizona*, 410 U.S. 351 (1973); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368 (1836).

Supreme Court Rule 21.1(h) implements this requirement:

> "(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

Petitioner has not attempted to comply with this rule because compliance would be impossible.

None of the opinions below passed on any federal question. "[I]t will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). No such showing has been made.[2]

---

[2] Petitioner in the Court of Appeals did refer to, without raising as an issue, possible constitutional defects in a rule of will construction excluding him from "issue" by reason of his non-marital birth. The Court of Appeals explicitly declined to rest its decision on Petitioner's non-marital birth, and held that a person born out of wedlock is presumed to be included in a class gift to "issue". 66 N.Y.2d at 154-55, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347.

The Petition should be dismissed for lack of jurisdiction under 28 U.S.C. §1257(3) and failure to comply with Rule 21.1(h).

II. The Decision of The Court of Appeals Raises No Constitutional or Other Federal Issue.

Each of Petitioner's purported constitutional claims is based solely on his assertion that the Court of Appeals has engaged in the "judicial modification of an unambiguous statutory definition", and thereby has deprived him of his right to the equal protection of the laws and his right to due process of law under the Fourteenth Amendment to the United States Constitution. Petition, pp. i & ii. This assertion is grounded in Petitioner's argument to the courts below that the case is controlled by a definition of the term "issue" found in N.Y. Est., Powers & Trusts Law ("EPTL") §1-2.10. The Court of Appeals rejected this argument, holding that the statutory definition did not resolve the case one way or the other. The Petition herein attempts to make this argument once again by cloaking it in constitutional garb.

It is fundamental that the ultimate authority to construe and interpret a state statute lodges in the state's highest court, and not in this Court. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). The Court of Appeals did not "amend" or "modify" EPTL §1-2.10. It examined the statute, together with its legislative history, and determined that it did not control this case. No New York decision before or after enactment of the statute had construed the term "issue" in a testator's will as applied to a child adopted *out* of the testator's family. No New York decision had ever considered whether the statute had any bearing on such a case. The Court of Appeals found that the statute was intended to clarify the status of a child adopted *into* a testator's family, but otherwise was intended merely to codify prior decisional law:

> "EPTL 1-2.10, added in 1966, defines 'issue' as descendants in any degree from a common ancestor, unless a contrary intention is indicated, and specifically

> includes children adopted into the family, thus resolving a conflict which had existed in decisional law . . . . Other than that clarification, the Revisors' Notes indicate that the section merely codifies decisional law . . . ." 66 N.Y.2d at 154, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347 (citations omitted).

There being no prior decisional law on the status of an adopted-out child, the Court of Appeals found that the statute did not control this case. In so holding it was merely doing what courts do day in and day out, determining the meaning and extent of a statute's reach. The statute is "unambiguous" in the eye of Petitioner, but the majority of the Court of Appeals disagreed.

Petitioner claims that the Court of Appeals effected a retroactive change in the law. On the contrary, the issue was one of first impression in New York, recognized as such by the Court of Appeals. 66 N.Y.2d at 157, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348-49. Petitioner cites no prior New York case deciding the point.[3]

Petitioner's disagreement with the Court of Appeals as to the scope of EPTL §1-2.10 is not a claim under the Constitution or under federal law. This Court has long acknowledged state discretion to regulate the disposition of property at death within its borders. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170 (1972).

We need not repeat the "[p]owerful policy considerations," 66 N.Y.2d at 155, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347, which led the Court of Appeals to rule as it did. They are set forth in

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[3] Petitioner also made an argument in the courts below based on N.Y. Dom. Rel. Law §117, which is referred to in passing on pp. 7-8 of the Petition. Here too the Court of Appeals carefully considered the wording and history of the statute, concluding that it "certainly does not preserve the right to inherit a class gift in such circumstances." 66 N.Y.2d at 156, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348.

the majority opinion. Petitioner has not made the slightest showing that the Court of Appeals' decision deprives him of any constitutional right.[4]

CONCLUSION

For the reasons set forth above, the Petition should be dismissed.

Respectfully submitted,

DEVEREUX MILBURN

Counsel of Record for Respondent

Of Counsel

RICHARD B. COVEY
DAN T. HASTINGS
R. DEMAREST DUCKWORTH, III

February 19, 1986

[4] As part of his due process claim Petitioner asserts that he has been deprived of a "vested" property right. Petition, p. 21. Whether Petitioner had any property right at all was what was adjudicated in this case. Having failed to show that the Court of Appeals acted unconstitutionally in construing state law, Petitioner never had a constitutionally protected property interest. *Cf. Board of Regents v. Roth*, 408 U.S. 564 (1972).

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No. 85-1249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID L. McCOLLUM,

Petitioner,

– against –

ANTHONY R. REID,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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March 14, 1986

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Docket No. 85-1249

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OCTOBER TERM, 1985

DAVID L. MC COLLUM,

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- against -

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Respondent.

PETITIONER'S REPLY BRIEF

POINT I

THE ISSUE OF THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE BEFORE THE COURT OF APPEALS

Respondent erroneously argues that the petitioner did not make its constitutional arguments in the New York State Court of Appeals. However, respondent

acknowledges that petitioner previously made his Equal Protection argument during the proceedings before the New York State Court Appeals. (Respondent's brief at page 6). Since the Court of Appeals considered the Petitioner's rights under the Equal Protection Clause because of his having been born "out of wedlock", the Court by clear implication considered whether the holding excluding the petitioner from the class by virtue of being "adopted out" of his natural family violated his rights under the Equal Protection Clause. Webb v. Webb, 451 U.S. 493 (1981).

Prior to the decision of the Court of Appeals decisions had been rendered by the Surrogate's Court and the Appellate Division of the Supreme Court in this matter. In both decisions the Courts

adhered to the statutory definition of the word "issue" and held that the petitioner, who was born out of wedlock and then adopted out of his natural family, was a member of the class "issue" as defined by the New York Legislature. N.Y. Est. Powers & Trusts Law 1-2.10. Indeed, the stipulation between the parties (contained at pp. A-64-66 of the petitioners Appendix) acknowledged that the petitioner clearly fit within the statutory definition of the word "issue".

The Court of Appeals interpreted the word "issue" so as to violate the plain meaning of the statute and so as to deprive the petitioner, and members of his class, from benefiting by the legislative definition. This case was the first instance in which the New York State Court of Appeals had or any New

York Court made such a construction. Therefore, neither party (nor any of the Courts rendering decisions in this case prior to the Court of Appeals) directly addressed the issue of the constitutionality of such a construction; instead the petitioner cited his general rights under the Equal Protection Clause and relied upon the statutory definition of the word "issue" in which he was included, as was found by the Surrogate and the Appellate Division of the Supreme Court.

To the extent that respondent argues that petitioner has not sufficiently raised the constitutional arguments below, certainly the petitioner should not be deprived of his constitutional rights because he did not specifically address a construction of a statute which had never been reached before; and which

was in direct violation of a legislative definition which had been relied upon by the petitioner, the Surrogate's Court, and the Appellate Division of the Supreme Court. To prohibit the petitioner from challenging such a construction would aggravate the violation of his rights and would create a vehicle by which the highest Court of a State could resolve litigation by altering a statutory definition thereby precluding the affected party from seeking redress to this Court. In the instant case the Surrogate, the Appellate Division of the Supreme Court, and two dissenting Judges of the Court of Appeals did not find it necessary to reach any constitutional issues as the resolution of this litigation was clearly found within a definition enacted by the New York Legislature. It was the major-

ity of the Court of Appeals which chose to deviate from such definition, thereby resulting in a constitutional deprivation to the petitioner for which relief is sought by way of this petition for certiori.

CONCLUSION

For the foregoing reasons the Petition for writ of certiori to the Court of Appeals of the State of New York should be granted.

Respectfully Submitted,

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for Petitioner

March 5, 1986